Supreme Court, U.S.
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No. 99-337

In The

Supreme Court of the United States

JANIS SOWERBY, as Personal Representative of the Estate of SCOTT MICHAEL HINKLEY, deceased, KAREN BOULAHANIS, GEORGE BOULAHANIS, individually and as next friend of BRIDGIT BOULAHANIS, a minor, KARA BOULAHANIS, a minor and BRIAN BOULAHANIS, a minor,

Petitioners,

v.

PREVO'S FAMILY MARKET, INC., a Michigan Corporation, IBP, INC., a Foreign Corporation and SPARTAN STORES, INC., a Michigan Corporation,

Respondents.

On Petition For Writ Of Certiorari To The Michigan Court Of Appeals

RESPONDENT IBP, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should deny review, as did the Michigan Supreme Court, of the decision of the Michigan Court of Appeals affirming the trial court's summary dismissal of Petitioners' state law tort claims on the ground that those claims are preempted by the Federal Meat Inspection Act, which expressly prohibits states from imposing requirements that are "in addition to, or different than" those contained in the Act.

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OPINIONS BELOW

The Order of the Michigan Supreme Court, denying Petitioners' Request for Leave to Appeal, is reported at 591 N.W.2d 38 (Mich. 1999) (Petitioners' Appendix F). The Opinion of the Michigan Court of Appeals is reported at 583 N.W.2d 509 (Mich. Ct. App. 1998) (Petitioners' Appendix A). The Opinions of the Circuit Court for the County of Mason, State of Michigan were not reported (Petitioners' Appendix B).

STATEMENT OF JURISDICTION

Respondent IBP does not contest Petitioners invoking jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. Art. VI, cl. 2.

RESPONDENT IBP'S STATEMENT OF THE CASE

In this fact-specific case, Petitioners allege that in 1993 they suffered injuries caused by ingesting Escherichia Coli 0157:H7 bacteria ("E. Coli"). They claim the source of the E. Coli was ground beef, which was sold by Prevo's Family Market, distributed by Spartan Stores, Inc., and processed by IBP, inc. ("IBP").[1]

In their depositions, Petitioners admitted that there were numerous other sources of E. Coli to which they were exposed (i.e., milk, lake water, fruits and vegetables). Respondents contend that Petitioners cannot establish that their injuries were caused by eating ground beef; however, for purposes of their motions for summary disposition and for these proceedings, Respondents accept as true the assumption that the source of E. Coli was ground beef purchased at Prevo's Family Market.

The processing of meat at IBP is regulated by the U.S. Department of Agriculture ("USDA") acting in conformity with the Federal Meat Inspection Act ("FMIA"), 21 U.S.C. § 601, *et seq*. Congress established this regulatory scheme in order to develop and administer uniform, national meat inspection programs. 21 U.S.C. § 661. USDA inspectors conduct an "examination and inspection" of all meat and "mark, strap, tag or label as inspected and passed all such products found to be not adulterated . . . " 21 U.S.C. § 606.

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[1] As required by Supreme Court Rule 29.6, IBP states that it has no parent company and that any subsidiaries of IBP are wholly owned by IBP, inc.

In 1993, there were twenty-one USDA inspectors who worked full time at IBP's Lexington, Nebraska facility, where the meat at issue was produced. These federal officials examined and inspected every carcass and stamped it "inspected and passed" before it was placed into commerce.

Respondents moved for summary disposition based upon the express preemption provision of the FMIA which prohibits states from imposing any requirements in addition to or different from those required by the federal Act. 21 U.S.C. § 678. The trial court granted that motion, reasoning that the FMIA clearly preempts any requirement to provide any labeling, testing or inspection in addition to or different than that required by the federal statutory scheme. Moreover, because federal law and regulation had not determined E. Coli to be an adulterant in 1993, meat packers and retailers were not required to test or inspect meat for E. Coli contamination at that time. Therefore, Michigan's concurrent jurisdiction over the distribution of adulterated products was inapplicable. Consequently, the trial court correctly held that Petitioners' state tort claims were preempted by federal law and regulation.

The Michigan Court of Appeals affirmed the trial court, and the Michigan Supreme Court denied Petitioners' application for discretionary review of that decision.

RESPONDENT IBP'S ARGUMENT

Respondent IBP contends that this case presents none of the compelling reasons set forth in Supreme Court Rule 10 for granting certiorari in this case.

First, the decision in this case has very narrow application. This case involves two families who claim that in 1993 they ate ground beef that contained E. Coli bacteria. At that time, the United States Department of Agriculture had determined that E. Coli was not an adulterant in meat. That regulation changed in September 1994. There are no other lawsuits in Michigan involving pre-1994 E. Coli-contaminated meat. Thus, the issue presented applies only to the Petitioners in this lawsuit, not, as Petitioners argue, to all Michigan consumers.

Second, the decision in this case does not conflict with the decision of any other court. Petitioners imply that every state except Michigan has ruled that claims such as Petitioners' are not preempted by federal law (Petition, pp. 8-9). This implication is absolutely false. Petitioners have cited no case law to support their position, because there is none. Contrary to Petitioners' misleading argument, Respondent IBP asserts that the decision below is consistent with both federal and state law, which support the statutory scheme established by Congress in the Federal Meat Inspection Act for regulating the meat industry.

Third, the decisions below comport with the compelling public policy that undergirds the preemption doctrine – the maintenance of a uniform national system of regulating interstate commerce, in this case, the meat

industry. The Federal Meat Inspection Act serves to protect public health while also preventing and eliminating the burden on commerce that would result from divergent regulation by the various states. The decision of the Michigan Court of Appeals foreclosed the dangerous precedent urged by Petitioners that would permit a state to impose tort liability contrary to a federal statute. Applied to the circumstances presented here, such a precedent would disrupt commerce by exposing a meat producer to differing duties and requirements among the 50 states. Further, the position pressed by Petitioners would permit states to impose liability for conduct that occurs before the applicable regulatory body (the USDA) takes action; i.e., a state court could impose liability on a meat producer for injuries due to a pathogen that the USDA has declared is not an adulterant in meat. Such a consequence is inimicable to the express preemption of the Federal Meat Inspection Act, which forbids states from imposing any requirements that are in addition to or different than those in the Act and which declares that only the USDA has the authority to determine what is an adulterant in meat.

The Federal Meat Inspection Act Expressly Preempts State Law

The doctrine of federal preemption has its origin in the Supremacy Clause of the Constitution which declares that the laws of the United States "shall be the supreme Law of the Land . . . " U.S. CONST. Art. VI, cl. 2. Thus, where federal preemption applies, state courts are deprived of subject matter jurisdiction.

A federal statute will not be presumed to "supersede the exercise of power by the State unless there is a clear manifestation of intention to do so." *New York Dep't of Social Serv. v. Dublino*, 413 U.S. 405, 413 (1973). The United States Supreme Court, the Sixth Circuit Court of Appeals, and the Michigan Court of Appeals have all held that by enacting 21 U.S.C. § 678, Congress clearly intended that the FMIA preempt state law in the field. *Jones v. Rath Packing Co.*, 430 U.S. 519, 530-531 (1977); *Armour & Co. v. Ball*, 468 F.2d 76, 83 (6th Cir. 1972), *cert. denied*, 411 U.S. 981 (1973), quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) ("In 21 U.S.C. § 678 'Congress has unmistakably so ordained' federal regulation of a field of commerce"); *Kircos v. Holiday Food Ctr.*, 477 N.W.2d 130, 131 (Mich. Ct. App. 1991) ("The FMIA contains a specific provision [21 U.S.C. § 678] expressing Congress' intent that the statute and its regulations, in specified areas, have preemptive force over state law.").

The extent to which Congress intended the FMIA to preempt state law claims is evident from the statute's "congressional statement of findings."

> Meat and meat food products are an important source of the Nation's total supply of food. They are consumed throughout the Nation and the major portion thereof moves in interstate or foreign commerce. It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. . . . It is hereby found that all articles and animals which are

> regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce, and that regulation by the Secretary and cooperation by the States and other jurisdictions as contemplated by this chapter are appropriate to prevent and eliminate burdens upon such commerce, to effectively regulate such commerce, and to protect the health and welfare of consumers.

21 U.S.C. § 602. In its statement of findings, Congress declared that it has already considered the protection of the consumer from unwholesome, adulterated and misbranded meat and has determined that the public interest would be best served by enforcement of a unified system of regulation pursuant to federal law and federal law alone.

Congress' intent is also clear from the express preemption clause of the statute which states, in pertinent part:

> Requirements within the scope of this chapter with respect to . . . any establishment at which inspection is provided . . . which are **in addition to, or different than** those made under this chapter may not be imposed by any State . . . Marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State . . . but any State . . . may, consistent with the requirements under this chapter, exercise concurrent jurisdiction . . . for the purpose of preventing the distribution for human food purposes of any such articles which

> are adulterated . . . and are outside of such an establishment . . .

21 U.S.C. § 678 [emphasis added].

The extent to which Congress intended the FMIA to preempt state law claims is further evident in the extensive regulatory scheme of the statute. Congress authorized the U.S. Secretary of Agriculture to develop and administer meat inspection programs to effectuate the threefold purpose of the Act (to prevent and eliminate burdens on commerce, to regulate the meat industry, and to protect the health of customers). 21 U.S.C. § 661. It is the task of the U.S. Department of Agriculture to make any rules and regulations that are necessary to effectuate these purposes. 21 U.S.C. § 621.

States are prohibited from imposing any "requirements" that are "in addition to, or different than" those promulgated by the U.S. Department of Agriculture. 21 U.S.C. § 678. The federal "requirements" referred to in Section 678 include not only that statutory provision but also USDA regulations and administrative actions such as the on-site USDA meat inspections and approvals conducted at meat processing facilities. To impose additional and different state requirements would contravene the public policy of the preemption doctrine. That public policy, as stated in the Act, "to prevent and eliminate burdens upon such commerce," is intended to protect companies from the imposition of varying requirements in the 50 states so that they are not subjected to differing duties among the many states where they do business. Thus, it was Congress' purpose to promote uniformity

not only in protecting the consumer, but also in protecting those engaged in commerce from potentially conflicting requirements of the various states.

A. Petitioners' Tort Claims Are Preempted Because They Are In Addition To And Different Than The FMIA

Petitioners claim breach of implied warranty and negligence in selling ground beef that allegedly contained E. Coli bacteria and in failing to label ground beef to advise customers that they must thoroughly cook ground beef in order to destroy the E. Coli bacteria. The preemption of Petitioners' negligence and implied warranty claims under 21 U.S.C. § 678 can best be understood by comparing the specific federal "requirements" applicable to meat production with the "state requirements" or duties Petitioners attempt to impose upon meat production.

To enforce the Act's prohibitions and policies, Congress authorized the U.S. Secretary of Agriculture/U.S. Department of Agriculture ("USDA") to develop and administer uniform, national meat inspection programs. 21 U.S.C. § 661. The USDA also has the exclusive authority to effectuate the purpose and enforcement of the Act. 21 U.S.C. § 621; *see* 9 C.F.R. 317 *et seq.* Inspectors, who are appointed by the USDA and act under its authority, conduct an "examination and inspection" of all meat and "mark, strap, tag or label as inspected and passed all such products found to be not adulterated . . . " 21 U.S.C. § 606.

In 1993, 21 USDA inspectors worked full time in IBP's Lexington, Nebraska slaughterhouse facility, where the allegedly contaminated meat was produced. These federal officials examined and inspected every carcass and stamped it "inspected and approved" before it was placed into commerce. As the trial court correctly observed, "By passing inspection, the meat was deemed fit for shipping and distribution." (Petitioners' Appendix B, p. 2).

The only exception to the express preemption provision of the FMIA is that the statute permits states to exercise concurrent jurisdiction as to meat that is adulterated. The term "adulterated" is defined at length in 21 U.S.C. § 601(m). The USDA did not consider meat containing bacteria, such as E. Coli "adulterated" in July of 1993 when Plaintiffs' cause of action arose. It was not until September 29, 1994, more than one year after Petitioners consumed the allegedly contaminated ground beef, that the USDA announced **for the first time** its new policy position that E. Coli bacteria was an adulterant.

Thus, when Petitioners' claim arose in 1993, there was no duty to test for E. Coli. Consequently, the Michigan Court of Appeals correctly found that to hold "defendants liable for failing to detect the presence of E. Coli bacteria in the meat purchased by Petitioners in 1993 would run contrary to the USDA's then-existing determination that inspection for E. Coli bacteria was not required." *Boulahanis v. Prevo's Family Mkt., Inc.*, 538 N.W.2d 509 (Mich. Ct. App. 1998), *appeal denied sub nom. Sowerby v. Prevo's Family Mkt., Inc.*, 591 N.W.2d 38 (Mich. 1999).

B. Petitioners' State Law Claims Are Preempted Because They Do Not Fall Within Michigan's Concurrent Jurisdiction Over Distribution Of Adulterated Meat Products

Petitioners argue that their claims are permissible under Section 678 as a "concurrent" state requirement because they would impose duties "consistent with Federal law." (Petition, pp. 13-14). Section 678 does permit states to exercise concurrent jurisdiction to prevent distribution of adulterated products. But the USDA, and only the USDA, must first determine whether the product is adulterated. Petitioners misconstrue this clause as somehow sanctioning their lawsuit because after their claims arose, the USDA classified meat containing E. Coli as "adulterated."

The USDA's decision to treat meat containing E. Coli as adulterated does not have retroactive effect. 5 U.S.C. § 551(4) (agency rules can only have prospective effect); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 209 (1988) ("administrative rules will not be construed to have retroactive effect unless their language requires this result"); *see also Landgraf v. USI Film Products*, 511 U.S. 244, 268 (1994) ("statutory retroactivity has long been disfavored"). Therefore, in order for a state to exercise concurrent jurisdiction, the state's requirements must be consistent with then existing federal requirements *not* with regulations that are made at a later date.

Petitioners also argue that just because the USDA did not consider meat containing E. Coli as adulterated until 1994, "does not mean that it was not, in fact and in law, adulterated prior to that time." (Petition, p. 15). That,

however, is precisely what it means; that is how federal preemption works. The FMIA expressly provides that the USDA, and the USDA alone, has authority to develop meat inspection programs and to make the rules and regulations necessary to effectuate the enforcement and purposes of the FMIA. 21 U.S.C. § 621, § 661. If E. Coli is to be deemed an adulterant, "it is the United States Secretary of Agriculture who must speak. When he fails to speak or misspeaks his authority, the state cannot substitute its voice." *Rath Packing Co. v. Becker*, 357 F. Supp. 529, 535 (C.D. Cal. 1973), *aff'd in part, rev'd in part*, 530 F.2d 1295 (9th Cir. 1975), *aff'd sub nom. Jones v. Rath Packing Co.*, 430 U.S. 519 (1979). In this case, as in *Rath Packing*, even if "the evidence here shows the United States Department of Agriculture may have abdicated some of its protective duty" by not treating meat containing E. Coli as adulterated until 1994, that "does not justify the application of a *different* . . . requirement by the state. . . . " *Id.*

Petitioners' federal "silence" argument (Petition, pp. 20-22) is likewise unpersuasive. In *Armour & Co. v. Ball*, the Sixth Circuit Court of Appeals rejected the argument that the "silence" of federal regulations allowed state regulation, and the court preempted the state requirement at issue under 21 U.S.C. § 678. The court held that even though federal regulations had made no provision for a particular type of sausage, the state was not permitted to interpose its own regulation. *Armour*, 468 F.2d at 85.

Furthermore, "a federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that

event would have as much pre-emptive force as a decision to regulate." *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983). Consistent with this body of case law, the Michigan Court of Appeals correctly held that the USDA's "intentional decision not to regulate the presence of E. Coli because it was not considered an adulterant carries the force of a positive enactment." *Boulahanis*, 583 N.W.2d at 512, citing *Ryan v. Brunswick Corp.*, 557 N.W.2d 541 (Mich. 1997).

C. The Trial Court Correctly Relied On *Kircos v. Holiday Food Ctr.*

The Michigan Court of Appeals was confronted with the same set of common-law actions, the same federal statute and the same express preemption issue in *Kircos v. Holiday Food Ctr.*, 477 N.W.2d 130 (Mich. Ct. App. 1991), *appeal denied*, 487 N.W.2d 412 (Mich. 1992) as are present in this case. There, plaintiff brought negligence and breach of implied warranty actions, based upon the same Michigan statute upon which Petitioners rely. Plaintiff alleged that defendant sold him pork containing trichinae from which he contracted trichinosis. The court concluded that the plaintiff's claims were expressly preempted by the FMIA pursuant to 21 U.S.C. § 678.

The court held: "Because the requirements of the Michigan statute are 'different than' those under the federal scheme, preemption is compelled. Although Michigan has concurrent jurisdiction for the purposes of preventing the distribution of 'adulterated' food, trichinae-infected pork is not 'adulterated' under the federal act [FMIA]." *Kircos*, 477 N.W.2d at 132. Similarly,

meat containing E. Coli was not "adulterated" under the FMIA in 1993, when Petitioners' cause of action arose; therefore, their claims would impose requirements different than those under the federal scheme and preemption is compelled.

The *Kircos* court also dismissed plaintiff's warranty claims, reasoning: "Because the federal statutory scheme provides that there is no duty to inspect or treat fresh pork for trichinae, plaintiff's warranty claims, which are based on assertions of unreasonable risk, must fail as well." *Id.* Likewise, in the instant case, Petitioners' claim for breach of implied warranty was correctly dismissed because there was no duty to inspect meat for E. Coli under the preemptive FMIA and USDA regulation in 1993.

CONCLUSION

The Michigan Court of Appeals correctly affirmed the summary dismissal of Plaintiffs' claims as preempted by the Federal Meat Inspection Act, 21 U.S.C. § 678. The U.S. Department of Agriculture has the sole authority to determine whether meat is adulterated. Because the USDA had not declared E. Coli an adulterant in 1993, when Plaintiffs' claims arose, there was no duty to inspect or test for E. Coli. The FMIA provides that states may not, via a tort claim, impose a duty to inspect or test for E. Coli, as such a duty would be in addition to or different than the requirements of the Act.

Petitioners have not shown grounds why this Court should grant certiorari. Because of the 1994 change in the

federal regulation, the decision in this case is only applicable to the Petitioners. More fundamentally, the lower courts' decisions were correct in that they are consistent with the compelling public policy of providing uniform federal regulation of the meat industry.

For these reasons, and for those given in Respondents Prevo's and Spartan's briefs in opposition, the Petition should be denied.

Respectfully submitted,

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